



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE: 1113/3/3/09

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004) (“the Rules”), the Registrar gives notice of the receipt of an appeal on 4 September 2009 under section 192 of the Communications Act 2003 (“the Act”) by Cable & Wireless UK; The Carphone Warehouse Group Plc; and Gamma Telecom Limited (together “the Appellants”) against a determination made by the Office of Communications (“OFCOM”) contained in a document dated 6 July 2009 and entitled “Dispute about per-customer line transaction charges for Carrier Pre-Selection – Further Statement”¹ (“the Determination”).

The Determination concerns a dispute (“the Dispute”) between the Appellants and British Telecommunications Plc (“BT”) over the charges payable by the Appellants to BT for a regulated wholesale communications service, namely Carrier Pre-Selection (“CPS”). CPS is a service which allows customers of communications providers other than BT, but who have a BT line, to select, in advance, alternative communications providers to carry some or all of their telephone calls without having to dial a prefix. The Dispute related to particular cost elements of the ‘per-customer line transaction charges’ incurred by BT in sending a notification of transfer letter and handling the resulting inbound customer calls following the application of CPS to a subscriber’s telephone line (the “Retail Costs”).

The Appellants submit that the Determination contains serious errors and that OFCOM made errors of law by failing to apply the statutory regime for dispute resolution, and misdirecting itself as to the exercise of its power under section 190(2)(d) of the Act to order repayment of overcharges. The Appellants raise four grounds of appeal:

1. OFCOM did not have the power in the Determination to decide that it was reasonable for BT to recover the Retail Costs through the CPS set-up charge for any period, having already determined that BT was not entitled to do so in a determination entitled “Dispute about per-customer line transaction charges for Carrier Pre-Selection, Determination and statement with consultation on repayment”² and published on 17 February 2009.
2. BT’s subjective appreciation was an irrelevant consideration. OFCOM misdirected itself in respect of the scope of its powers under section 190(2)(d) of the Act. In particular, OFCOM wrongly took into account whether BT had levied the disputed charges in bad faith or unreasonably when deciding whether or not to consider exercising its power to order repayment under section 190(2)(d). In so doing OFCOM took into account an irrelevant consideration, namely the subjective appreciation on the part of BT as to whether the Retail Costs could properly be included in the CPS set-up charge.
3. OFCOM misdirected itself as to the legal basis for the exercise of its power to order repayment. On a proper construction, OFCOM should have ordered repayment of historic overcharges.
4. OFCOM failed to act in accordance with its statutory duties and regulatory obligations. In particular:
 - (a) OFCOM wrongly ignored its statutory duties relating to competition, network access and the protection of the citizen-consumer, and the European Community law requirement to carry out its functions in a manner which does not favour one form of electronic

¹ http://www.ofcom.org.uk/consult/condocs/dispute_percustomer/statement/CPS_further_statement_060709.pdf.

² http://www.ofcom.org.uk/consult/condocs/deter_repayment/dispute130209.pdf.

communications network, electronic communications services or associated facility over another;

- (b) OFCOM failed in its regulatory duty to act proportionately and in accordance with best regulatory practice by considering the dispute exclusively from the point of view of BT, failing to address the underlying point in the absence of established prejudice to BT, the real prejudice of a charge which was not entitled to be levied was to the recipient of that charge; and
- (c) OFCOM failed to resolve the dispute transparently or consistently.

The Appellants seek the following relief from the Tribunal:

1. an order setting aside the Determination;
2. an order remitting the subject matter of the Determination to OFCOM with a direction from the Tribunal that OFCOM should order repayment to the Appellants of overpayments made by them to BT since 28 November 2003 as a result of the erroneous inclusion by BT of the Retail Costs in the CPS set-up charge, plus interest;
3. such other order or relief as the Tribunal may consider appropriate; and
4. an order that OFCOM pay the Appellants' costs.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE
Registrar

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